United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-1927

United States Court of Appeals

FOR THE SECOND CIRCUIT

SIDNEY DANIELSON, Regional Director
of the National Labor Relations Board,
Region 2, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION NO. 501, AFL-CIO,

Respondent-Appellee

On Appeal from an Order of
the United States District Court for the District of Connecticut

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Brief for Petitioner-Appellant

MARVIN ROTH,
Deputy Assistant General Counsel,

ERIC MOSKOWITZ,
Attorney.

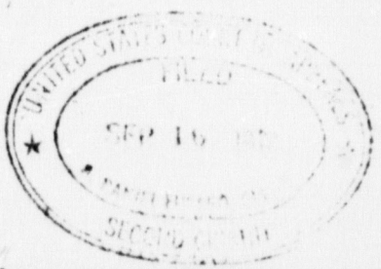
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

GERALD BRISSMAN,
Associate General Counsel.

September, 1974.



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UNITED STATES COURT OF APPEALS
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v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
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Respondent-Appellee

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PETITIONER-APPELLANT

STATEMENT OF ISSUES PRESENTED

1. Whether the court below committed reversible error in concluding that the Board did not have reasonable cause to believe that the Union, acting in furtherance of its demands that its members employed by two electrical subcontractors be assigned the work of operating switch boxes used to furnish temporary power on two construction sites, said work having been assigned by the general contractor to its own employees who are not represented by the Union, violated Section 8(b)(4)(B) of the National Labor Relations Act by

threatening to strike and/or striking the subcontractors for an object of forcing them to cease doing business with the general contractor and other persons.

2. Whether the injunctive relief requested by the Board is just and proper.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Connecticut, per Hon. John O. Newman, denying a petition for a temporary injunction filed on behalf of the National Labor Relations Board (herein "Board") by Petitioner-Appellant Sidney Danielson, Regional Director of the Second Region of the Board, pursuant to provisions of Section 10(1) of the National Labor Relations Act as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(1) (herein "the Act")). The order was entered on May 22, 1974 (A. 124), [1/] predicated upon findings of fact and conclusions of law contained in a memorandum opinion dated May 21, 1974 (unofficially reported at 86 LRRM 3117) (A. 118). Notice of Appeal was filed on June 26, 1974. Jurisdiction of this court is invoked under Section 1291 and 1292 of Title 28 of the United States Code.

The petition for an injunction, filed with the court below on April 19; 1974 (A. 2), was based on charges filed with the Board on April 10 and 15, 1974, by the Associated General Contractors of Connecticut, Inc. (herein "AGC"), a multi-employer bargaining association, on behalf of Atlas Construction Company ("Atlas") alleging that respondent-appellee International Brotherhood of Electrical Workers, Local Union No. 501 (the "Union") had engaged in and was engaging in unfair labor practices

1/ "A" references are to pages of the Appendix.

proscribed by Section 8(b)(4)(B) of the Act, which section prohibits secondary boycotts. After investigation, the Regional Director concluded that there was reasonable cause to believe that the Union had engaged in the charged unfair labor practices and that a Board complaint should issue. Accordingly, the Regional Director filed the petition for injunctive relief, pursuant to Section 10(l), pending final disposition of the charges by the Board.

The Union filed an answer (A. 9) which in substance denied the allegations of the petition. However, in its memorandum of law to the district court, the Union admitted engaging in the charged conduct, but contended that such conduct was solely in furtherance of disputes with Peter M. Santella, Inc. ("Santella") and Rice Electrical Contracting Company ("Rice"), the struck employers, and did not constitute a secondary boycott. On April 26, and 29, 1974, 2/ the court conducted a hearing at which the parties were afforded full opportunity to and did present evidence and argument on the evidence and law.

The pertinent facts adduced at the hearing below, which are substantially undisputed, and which involve parallel conduct at two separate construction projects may be summarized as follows:

A. Facts Relating to the Stamford Dressed Beef Construction Project

Pursuant to a civil court order, Stamford Dressed Beef Company ("Stamford Dressed Beef"), a processor of meats and poultries, was required

2/ All dates herein are in 1974 unless otherwise indicated.

to move from its premises in Stamford, Connecticut by September 6, 1974 in order to make way for an urban renewal project (A. 13). Through its corporate subsidiary, Stamford Realty and Construction Company ("Stamford Realty"), Stamford Dressed Beef obtained the services of Atlas to act as the general contractor for the construction of its new plant (herein "Stamford project"). 3/ Atlas, a member of AGC, has employees in various building trades (A. 12). However, Atlas does not employ any electricians, none of its employees are represented by the Union, and neither Stamford Dressed Beef, Stamford Realty, nor Atlas has any collective bargaining relationship with the Union.

Atlas subcontracted the electrical work at the Stamford project to Santella, whose employees are covered by the terms of a collective bargaining agreement between the Union and Westchester-Fairfield Chapter of National Electrical Contractors Association, a multi-employer bargaining association (herein "NECA"), to which agreement Santella is a signatory (A. 50, 115). In subcontracting out the electrical work, Atlas decided, however, that Santella was not to be responsible for or be assigned the work of maintaining temporary electric power at the construction site (A. 14-17), i.e. turning an electric switch on in the morning to put on the electricity and turning it off at night when the site closed down (A. 16, 39).

3/ Although Stamford Realty is nominally the "general contractor" and Atlas the "construction manager," Atlas in reality performs all of the functions of a general contractor, including the subcontracting of work (A. 12).

Atlas president, Joseph Gambino concluded that it would be more economical for Atlas' clients if Atlas' own employees were to perform this function (A. 25).[4/]

Construction at the Stamford project began in April, 1973 and Santella commenced the electrical work in early March, 1974 (A. 13, 106, 17). However, on March 27, Santella, through its job foreman, was notified that the Union's electricians employed by Santella were being withdrawn from the project (A. 44, 49). The next day, Santella president Peter Santella telephoned Union business manager Fred Wright, who claimed that Santella was in violation of its contract with the Union because it had no electricians to stand by on the temporary power (A. 44-45). After being warned by Atlas that it would hire another subcontractor unless the electrical work were resumed (A. 44-45, 85), Santella spoke to the Union's

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4/ An electrician's day ends at 3:30 p.m., while other trades do not quit until 4:30 p.m.. If an electrician were required to be stationed at the site for the sole purpose of turning off the switch when everyone left the site, he would have to be paid double time rates for at least one hour each day, plus double time during any additional periods when the other trades were required to work overtime. The amount of such wages, plus the electrical contractor's overhead and profit, totalling $36.00 per hour, would be billed to Atlas and ultimately to Stamford Dressed Beef. Therefore, the general contractor would be required to use the unwanted and at best, marginal services of an electrician, at a substantial cost to the project owner but at a substantial profit to the electrical contractor with whom the Union allegedly has its dispute. (A. 18-20, 35, 51-52, 57-59, 65).

attorney, who invoked Rule 27(c) of the Union's contract with NECA, which provides in pertinent part (A. 117):

> Where wiring systems and equipment are required for lighting, power, heat, etc. during the period of construction of a building, these systems and equipment shall be installed, maintained and operated by electrical workers. . . .

Although Atlas was not a signatory to the Union-NECA contract and Santella never had the work of maintaining temporary electricity at the Stamford project, the Union's attorney nevertheless contended that Santella was in breach of its contract with the Union (A. 46, 49).

Santella, in response to the Union's demands, unsuccessfully sought to obtain from Atlas the work of maintaining temporary power (A. 46, 86). On April 11, Atlas president Gambino and Santella met at the jobsite with Edward Troy, a representative of the Union (A. 18). Gambino told Troy, in substance, that he did not want to give the work to Santella and thereby cause substantial additional expenses to the owner (A. 18, 19), and Santella pointed out that he could not meet the Union's demands without violating his contract with Atlas. (A. 47). Troy, who apparently acknowledged that the Union's dispute was with Atlas and that Santella was caught in the middle of that dispute (A. 46-47), told Gambino that the Union "had jurisdiction over all the temporary power work on the job," regardless of which employer had that work, and threatened that the "men of Local 501 would not return to the job until such time as Local 501 members were permitted to operate the switch" (A. 20).

Santella suggested a compromise whereby Atlas personnel would continue to operate the switch until the Board decided whether the Union could legally stop work in these circumstances, and should it be found that the Union was acting properly, Atlas would pay the wages of an electrician retroactively (A. 21, 47). Troy referred the suggestion to Union business manager Wright, who rejected it.

Wright insisted that until the courts resolved the matter, an electrician be assigned to operate the switch box and be paid full doubletime electrician's wages for the overtime work. Atlas rejected Wright's demand (A. 21-22, 48).

The Union and Santella then submitted the Union's demands to the Labor-Management Committee, a panel comprised solely of representatives of the Union and NECA, which is empowered under the provisions of their collective bargaining agreement, to resolve "grievances or questions in dispute" relating to the agreement. (A. 116). On April 23 the Committee decided that Santella was in violation of the contract by reason of the failure of its employees to perform the disputed work. Neither Atlas, Stamford Realty nor Stamford Dressed Beef were parties to or participated in the arbitration proceeding, nor does the record indicate that they were given notice of the proceeding. (A. 50-51). Santella then agreed to employ an electrician, at Santella's own expense, to remain at the site as long as the temporary power was on, but the electrician would only be allowed to check circuits, not to operate the switch. Under these conditions, Santella's employees returned to the project on April 26, (A. 53-54).

B. Facts Relating to the Hilti Inc. Construction Project

The facts in relation to this project substantially parallel the facts related above. Herloy, Inc. ("Herloy"), a general contractor in the building and construction industry, obtained the services of Atlas, nominally, as "consultant," but in reality as the general contractor in the construction of an office building in Stamford, Connecticut for Hilti, Inc. (herein "Hilti project") (A. 23). Atlas subcontracted the electrical work to Rice, whose employees, like those of Santella, are covered by the terms of the collective bargaining agreement between the Union and NECA. (A. 115). Atlas retained Rice to perform the electrical work on substantially the same terms as Santella had on the Stamford Dressed Beef project, i.e., Rice was not offered or assigned any responsibility for maintaining temporary electric power, that function being retained by Atlas for its own personnel (A. 25, 98). 5/

Construction of the Hilti project began in April 1973, and was scheduled for completion in July 1974 (A. 24). 6/ Rice

5/ At the Hilti project, the installation of the temporary power switch box and the stringing of the power lines onto the site was done by Rice. As was the case with Santella at the Stamford project, the only aspect of the temporary power work at the Hilti project not awarded to and performed by Rice's employees was the operation of the circuit breaker switch (A. 38-39). If Atlas had assigned this work to Rice, Rice would have been compensated at cost plus 15 percent for overhead and profit (A. 105).

6/ The Hilti project is presently scheduled for completion by September 1, 1974. However, as we shall show, the underlying dispute between the Union and Atlas has not been resolved, the unfair labor practice case is in litigation before the Board, and injunctive relief is still warranted.

commenced work in March 1974 (A. 25). However, on or about April 5, Union representative Troy told Chester Rice, president of the Company, that Rice was breaching their collective bargaining agreement by not assigning a Rice employee to operate the temporary power switch box. Troy threatened Rice that unless Rice did assign this work to the electricians, the Union might remove all of Rice's employees from their jobs (A. 40). As a result of this threat Rice ceased work at the site (A. 28-29, 40-41).

On April 11, the same day that he met with Union to discuss the Stamford project (supra, p. 6), Atlas president Gambino refused Rice's request that Rice's electrician employees be permitted to operate the temporary power switch box (A. 29). However, on or about April 17, Rice's employees returned to work at the Hilti project under conditions agreed to by Rice and Atlas whereby Atlas agreed to let a Rice employee operate the switch at 8:00 a.m. and 3:30 p.m. as long as there was no charge to Atlas. Atlas made clear that if it became necessary to operate the temporary power switch at other than the normal starting and quitting times, the switch would be operated by someone designated by Atlas. No payments would be made to Rice if its employees were permitted to stay overtime either to work on Rice's contract, or to stand by the temporary power switch (A. 29, 32, 89). On or about April 26, the first day of the hearing below, Gambino withdrew his permission to allow Rice's employees to operate the switch, but the Union did not carry out its threat to strike Rice (A. 55-57).

C. The District Court's Memorandum of Decision and Order denying injunctive relief

Upon the foregoing facts, the court below on May 21, 1974 issued its Memorandum of Decision denying the petition for a temporary injunction. The court acknowledged that Atlas had categorically excluded the work of maintaining temporary power from its subcontracts with Santella and Rice (A. 118-119). The court further observed that the subcontracts were not necessarily inconsistent with the Union's collective bargaining agreement with Santella and Rice because Rule 27(c) of the agreement (supra, p.6) could reasonably be read "as only prohibiting a subcontractor whose work includes temporary power from giving such work to non-electrical workers" (A. 120). However, in view of the failure of Santella and Rice to dispute the Union's contention that they were in breach of the collective bargaining agreement (a failure which as shown, was in the mutual economic interest of the Union and the electrical subcontractors), the court found that the interpretation of the collective bargaining agreement urged by the Union i.e., "that the employer will not undertake any subcontract that fails to include temporary power in the work being subcontracted" was "sufficiently plausible to support a conclusion that /the Union/ has a legitimate dispute with Santella and Rice concerning the Union's contract with these employers" (A. 120-121).

The district court held that in view of the foregoing findings, a finding that the Union violated Section 8(b)(4)(B) of the Act would have to be predicated on the Board's "right of control" test, which the court construed as meaning that "where the right of control of disputed work is, at the time of the dispute, not within an employer, then any coercive pressure directed to him is a violation of §8(b)(4)(B)" (A. 121). The court conceded that under applicable Board law, the Union's threats and strike conduct were unlawful. However, relying upon decisions of several courts of appeals (but not this Court), the court below concluded that the finding of a violation could not be properly predicated upon a per se application of the "right of control" test, as the court construed that test. Therefore the court concluded that injunctive relief should be denied because, in its view, the Board's case rested on an erroneous theory of law (A. 121-123).

On this appeal, we shall show that the evidence adduced below demonstrated at least reasonable cause to believe that in all the circumstances of the case, the Union's pressure against Santella and Rice was not directed against the person or persons with whom it has its dispute; that the court below erroneously construed the right of control test as a per se rule; that the propositions of law here advanced by the Board are supported by Supreme Court and other decisional authority, including decisions of this Court; and that the court below therefore committed reversible error in failing to conclude that the Board had reasonable cause to believe that the Union violated Section 8(b)(4)(B) of the Act, and consequently in denying injunctive relief.

ARGUMENT

I. PRELIMINARY STATEMENT: THE STATUTORY SCHEME PURSUANT TO WHICH THE PROCEEDINGS WERE INITIATED IN THE COURT BELOW; AND THE APPLICABLE STANDARDS FOR INJUNCTIVE RELIEF IN A SECTION 10(1) PROCEEDING WITHIN THE STATUTORY SCHEME

Section 10(1) of the Act [7] embodies the determination of Congress that certain unfair labor practices give, or tend to give rise, to such serious interruptions to commerce as to require their discontinuance pending adjudication by the Board, to avoid irreparable injury to the policies of the Act and the frustration of the statutory purpose which otherwise would result (S. Rep. No. 105, 80th Cong. 1st Sess., pp. 8, 27; I Leg. Hist. LMRA 414, 433). In that section, therefore, Congress imposed a mandatory duty upon the Board's officer or regional attorney to whom the matter is referred to seek appropriate injunctive relief in a district court upon a reasonable belief that a violation has occurred and empowered the

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7/ Section 10(1) of the Act, in pertinent part provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of Section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have (Cont'd)

court petitioned to grant the injunctive relief deemed "just and proper." [8/] As explained in the Senate Report on the bill which became the Act (Ibid):

> . . . Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the Committee is convinced that additional procedures must be made available under the National Labor Relations Act in order to adequately protect the public welfare which is inextricably involved in labor disputes.
>
> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by the enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives--the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence, we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek relief in the case of strikes and boycotts defined as unfair labor practices. . . .

Because of the Congressional policy favoring the granting of Section 10(1) injunctions, this Court, in agreement with other courts of appeals, has held that although appellate review of an order granting

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7/ (Cont'd) jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: . . . .

8/ Section 10(j) of the Act empowers the Board to seek injunctive relief in the case of all other types of unfair labor practices not covered by Section 10(1).

a Section 10(l) injunction is limited to determining whether the district court was "clearly erroneous" in finding reasonable cause to believe that the Act had been violated and whether the district court abused its discretion in granting the requested injunctive relief, the scope of review is not so limited when an injunction is denied. McLeod v. National Maritime Union and Commerce Tankers Corp., 457 F.2d 1127, 1133-34 (C.A. 2, 1972), and cases cited therein. 9/

It is settled that in a proceeding under Section 10(l) of the Act, the district court is not called upon to decide the merits of the unfair labor practice case, i.e., whether, in fact, a violation has occurred; the ultimate determination of this question, with respect to issues of fact and issues of law, is reserved exclusively for the Board, subject to review by the court of appeals pursuant to Section 10(e) and (f) of the Act. N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 681-683 (1951). The inquiry of the district court is limited to whether the Board has reasonable cause to believe that the respondent was violating the Act as charged, if it so concludes, it must grant such relief as it deems just and proper.

9/ See also, Douds v. International Longshoremen's Association, 242 F.2d 808, 811-812 (C.A. 2, 1957); Wilson v. Milk Drivers & Dairy Employees Union, 491 F.2d 200, 203-204 (C.A. 8, 1974); cf. McLeod v. Local 282, Teamsters, 345 F.2d 142, 145 (C.A. 2, 1965).

With respect to factual issues ". . . /t/he evidence need not establish a violation. It is sufficient . . . if there be any evidence which together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe that a violation has occurred." Madden v. Hod Carriers', Local 41, 277 F.2d 688, 692 (C.A. 7, 1960), cert. denied 364 U.S. 863. Accord: Douds v. Milk Drivers and Dairy Employees Union, 248 F.2d 534, 537 (C.A. 2, 1957); Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, 494 F.2d 1230, 1245 (C.A. 2, 1974); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 546 (C.A. 9, 1969).

With respect to legal issues, this Court has held that "the district court should be hospitable to the views of the General Counsel, however novel" (Danielson v. Joint Board, supra) for "the Board, rather than the district courts, remains the 'primary fact finder' and 'primary interpreter of the statutory scheme,' subject to judicial review by a court of appeals pursuant to Sections 10(e) and (f) /of the Act/." McLeod v. National Maritime Union (Prudential Grace Lines, Inc.), 457 F.2d 490, 494 (C.A. 2, 1972); and McLeod v. Local 25, Electrical Workers, 344 F.2d 634, 638 (C.A. 2, 1965); citing Schauffler v. Local 1291, International Longshoremen's Association, 292 F.2d 182, 187 (C.A. 3, 1961). Although in Danielson v. Joint Board, supra, this Court, in disagreement with other courts of appeals (494 F.2d at 1244-45) held that a district court should deny injunctive relief "when after full study, the district court is convinced that the General Counsel's legal position is wrong," prior decisions of this Court make clear

that judicial decisions which are adverse to the Board's position, or disagreement by the district court with that position do not alone negate "reasonable cause." Douds v. Milk Drivers and Dairy Employees Union, supra, 248 F.2d at 538; McLeod v. Local 282, Teamsters, supra, 345 F.2d at 145 (Section 10(1) proceeding involving application of the right of control test, in which this Court reversed the denial of an injunction); McLeod v. National Maritime Union and Commerce Tankers Corp., supra, 457 F.2d at 1133; Kaynard v. Independent Routemen's Association, 479 F.2d 1070 (C.A. 2, 1973); McLeod v. A.F.T.R.A., 234 F. Supp. 832, 838 (S.D.N.Y., 1964), aff'd. 351 F.2d 310 (C.A. 2, 1965). See also, McLeod v. Sheet Metal Workers Local 28, 334 F. Supp. 1098, 1100 (S.D.N.Y., 1971) (Section 10(1) proceeding in which the district court, applying the right of control test, granted injunctive relief on the authority on this Court's decision in N.L.R.B. v. Enterprise Association, 285 F.2d 642 (C.A. 2, 1960)); McLeod v. Security Guards and Watchmen Union, 333 F. Supp. 768, 770-771 (S.D.N.Y., 1971); McLeod v. Local 32E Building Service Employees Union, 227 F. Supp. 242, 245-246 (S.D.N.Y., 1964). And see, Sachs v. Local Union No. 48, Plumbers, 454 F.2d 879 (C.A. 4, 1972) (Section 10(1) proceeding involving a factual context similar to that in the present case in which the court of appeals, without passing on the validity of the right of control test, found that the case presented factual questions which warranted resolution by the Board, and therefore reversed the denial of injunctive relief. 10/

10/ In Sachs, the court of appeals held (454 F.2d at 883): (Cont'd)

II. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN FAILING TO CONCLUDE THAT THERE WAS REASONABLE CAUSE TO BELIEVE THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT.

A. The Applicable Principles of Law

Section 8(b)(4)(i)(ii)(B) of the Act, [11] commonly is referred to

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10/ (Cont'd)

The mark of a labor dispute is the presence of economic adversaries. It is highly improbable that a bona fide labor dispute exists if both employer and employees stand to benefit from increased work on the job site. The Board, therefore, has reasonable cause to believe that no labor dispute exists between Phillips /the struck employer/ and the unions and that the unions are engaged in a product boycott /involving the use of prefabricated plumbing on a jobsite/, forbidden by the Act. The facts necessary to decide whether the unions' conduct is primary or secondary are yet to be established, but Congress has placed the responsibility of ascertaining them and initially assessing their import on the Board, not the courts. See Schauffler v. Longshoremen's Local 1291, 292 F 2d 182, 187, (3d Cir. 1961). At this stage of the proceedings it is sufficient for the Board to show, as it has done, reasonable cause for believing that §8(b)(4)(B) has been violated.

11/ Section 8(b)(4)(i)(ii)(B) of the Act makes it an unfair labor practice for a labor organization or its agents, in pertinent part: "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . .

"(B)" forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business (Cont'd)

as the section of the Act prohibiting secondary boycotts. 12/ As interpreted by the Board and the courts, this section does not prohibit a union from taking traditional primary action against an employer, e.g., by appealing to his employees not to perform services in furtherance of a labor dispute with that employer. It does, however, prevent a union from bringing pressure to bear on the primary employer or person through another employer, commonly referred to as a "secondary" employer, in furtherance of such a dispute. The test in determining whether strike conduct is primary or secondary is whether the union is seeking to disrupt an employer's business to force him to resolve favorably a real dispute concerning the terms and conditions of employment of his employees, or whether the disruption is sought either as a means of pressuring another employer who is the true offender or as a means of otherwise achieving some union goal elsewhere. In the former case, the union's activity is "primary" and outside the reach of the statute; in the latter it is "secondary" and proscribed. National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 644-645 (1967); Houston Insulation Contractors Association v. N.L.R.B., 386 U.S. 664, 668-669 (1967). "There need not be an actual dispute with the boycotted employer /here, Atlas/ for the activity to fall within /the proscription of Section 8(b)(4)(B)/,

11/ (Cont'd) with any other person . . ." Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

12/ In the 1947 Taft-Hartley Amendments to the Act, the secondary boycott provisions were contained in the Sections 8(b)(4)(A) of the Act. In the 1959 amendments they are consolidated in the renumbered 8(b)(4)(i)(ii)(B).

so long as the tactical object of the /union's conduct/ is that employer." National Woodwork Manufacturers Association v. N.L.R.B., supra.

Section 8(b)(4)(B) thereby reflects "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." N.L.R.B. v. Denver Building & Construction Trades Council, supra, 341 U.S. at 692; N.L.R.B. v. Local 825, Operating Engineers, (Burns & Roe, Inc.) 400 U.S. 297, 303 (1971); National Woodwork Manufacturers Association v. N.L.R.B., supra, 386 U.S. at 620. Thus, Section 8(b)(4)(B) prohibits a union from engaging in economic sanctions against a secondary employer in the form of a work stoppage or a threat of a work stoppage by the union which represents his employees for an object of forcing him to cease doing business with the primary employer. N.L.R.B. v. Local 825, Operating Engineers, supra, 400 U.S. at 303-304; N.L.R.B. v. International Brotherhood of Teamsters, Local 294, 342 F.2d 18, 21-22 (C.A. 2, 1965); N.L.R.B. v. Plumbers Union of Nassau County, 299 F.2d 497 (C.A. 2, 1962). Such conduct is proscribed regardless of whether the cessation of business is an intermediate, alternative or conditional object of the picketing; e.g., where the union, as an alternative to a total cessation of business, seeks to change the manner in which the secondary does business with the primary, or to impose additional costs upon the secondary employer. N.L.R.B. v. Local 825 Operating Engineers, supra, 400 U.S. at 304-305; Bangor Building Trades Council (Davison Construction Co., Inc.) 123 NLRB 484,

489, n. 4 (1959), enf'd as modified, 278 F.2d 287, 290 (C.A. 1, 1960); Local 47, Teamsters (Texas Industries, Inc.), 112 NLRB 923, 925, n. 2 (1955), enf'd 234 F.2d 296 (C.A. 5, 1956); United Steel Workers of America (Tennessee Coal & Iron Division of United States Steel Corp.) 127 NLRB 823, 828-9 (1960), enf'd as modified 294 F.2d 256 (C.A.D.C., 1961). For it is settled law that conduct having a secondary object is proscribed even though the Union's conduct may have other, legitimate objects. N.L.R.B. v. Denver Bldg. & Construction Trades Council, supra, 341 U.S. at 688-689; I.B.E.W. v. N.L.R.B., 341 U.S. 694, 700 (1951).

B. The evidence adduced below demonstrated reasonable cause to believe that the Union violated Section 8(b)(4)(ii)(B) of the Act.

The evidence summarized above (pp. 3-9) demonstrated at least reasonable cause to believe that the Union's pressure against Santella and Rice, in the form of threats or work stoppages at their respective job sites, was secondary and violative of Section 8(b)(4)(B) of the Act and that the court below erred in failing to so conclude.

In threatening and engaging in work stoppages against Santella and Rice, the Union attempted to justify its actions by claiming that those subcontractors were in breach of their collective bargaining agreements because Atlas, the general contractor, was using its own personnel to maintain temporary power at the jobsites. As the district court acknowledged (supra, p.10), the Union's interpretation of the agreement was questionable, for the contract could reasonably

be read as only prohibiting a subcontractor whose work includes temporary power from giving such work to non-electrical workers. More fundamentally, the Union had no dispute with Santella or Rice because neither employer had the right or the power to make an assignment of the disputed work. Atlas, acting in the economic interests of its clients, had categorically excluded the maintenance of temporary power from the electrical subcontracts. And Santella, in a vain effort to end the Union's work stoppage, unsuccessfully sought to obtain that work from Atlas. Union representative Troy acknowledged that his Union's dispute was with Atlas, and realistically addressed his demands to Atlas president Gambino in terms of all temporary power work on the jobsite, regardless of which employer had that work (supra, p. 6).

Thus, Santella and Rice at no time had the right to control the assignment of maintaining temporary power and were powerless to grant the Union's demands for such work. Santella and Rice, as a practical matter, could respond to the Union's pressure only by rescinding their subcontracts with Atlas. The evidence therefore demonstrates that in threatening the electrical subcontractors with work stoppages, the Union's real target was not Santella or Rice, but Atlas, i.e., the Union was seeking to put pressure on Atlas to obtain the work previously assigned by Atlas to its own personnel. Santella and Rice, then, were neutrals, caught between the conflicting demands of the Union and Atlas, and were without power to resolve the conflict except by

ceasing to do business with Atlas. And the fact that Santella (but not Rice), was able to compromise without actually meeting the Union's demands by paying an electrician to stand by without operating the switchbox (supra, p.7), did not mitigate the existence of a secondary boycott. Although the court below erroneously considered this ad hoc capitulation as evidence of a primary dispute with Santella (A. 122), the law is settled, as shown (supra, pp. 19-20), that the existence of an alternative object does not convert secondary activity into a primary dispute.

C. The right of control doctrine and its applicability to the present case

In circumstances similar to that here involved, the Board has for many years viewed an employer's power, or lack of power, to assign disputed work as a significant factor in making the primary-secondary distinction. In essence, the Board has held that a union-coerced employer who is powerless to satisfy the union's demands except by bringing pressure upon another independent contractor to change a business or labor policy, or alternatively by ceasing to do business with such other contractor, is presumed to be a neutral secondary, absent proof to the contrary.

The Board's analysis, which has been referred to in an overly simplistic fashion as the "right of control test," [13] was recently explicated by the Board in Local 438, Plumbers et al (George Koch Sons, Inc.) 201 NLRB 59 (1973), enf'd 490 F.2d 323 (C.A. 4, 1973),

13/ See Koch, infra, 201 NLRB 59. For brevity, the right of control test will generally be referred to here as the "control doctrine."

(herein Koch). After pointing out that "the Board's approach . . . is not now . . . nor was it ever . . . to /look/ solely at the pressured employer's 'contract right to control' the work at issue at the time of the pressure," the Board explained that it "has always proceeded with an analysis of (1) whether under all the surrounding circumstances the union's objective was work preservation and then (2) whether the pressures exerted were directed at the right person, i.e. at the primary in the dispute." (201 NLRB at 64).

However, the court below erroneously concluded (A. 122) that the control doctrine constitutes a per se approach to the question of who is a neutral employer. Koch, supra, 201 NLRB at 64, 490 F.2d at 327. The Board has made clear that the inquiry under the control doctrine does not stop at the formal contractual arrangement between the contractors, if evidence appears that the coerced employer may have actually had control. Koch, supra, 201 NLRB at 64; I.L.A. Local 1694 (Board of Harbor Commissioners), 137 NLRB 1178 (1965), enf'd., 331 F.2d 712 (C.A. 3, 1965) [14/] Moreover, if the struck employer's loss of power over the disputed work has been the result of his own

14/ In Harbor Commissioners, the Board exhaustively explored the relation of the various employers to the particular work involved before reaching its determination that the control of the work of removing goods from the harbor's docks, once unloaded from the ship, rested with the Harbor Commissioners, rather than the ship's agents who were responsible merely for unloading the cargoes onto the docks. Accordingly, it found that the strike by the employees of the ships' agents to force assignment of the removal work to them violated the secondary boycott ban because the agents were "without power to resolve the underlying dispute" over assignment of work under the Harbor Commissioners' control, 137 NLRB at 1182.

decision, efforts or "connivance" to have work subject to his work preservation agreement with the Union performed elsewhere, he is not a neutral with regard to that work. Koch, supra, 490 F.2d at 328; Pipe Fitters, Local No. 120 (Mechanical Contractor's Association of Cleveland, Inc.), 168 NLRB 991, 992 (1967); Painters District Council No. 20 (Uni-coat Spray Painting, Inc.), (herein Unicoat) 185 NLRB 930, 932 (1970). Thus, the Board's analysis has never been "a mechanical one." It studies "not only the situation the pressured employer finds himself in but also how he came to be in that situation" in order to determine whether he is "truly an 'unoffending employer' who merits the Act's protection." 15/ Koch, supra, 82 LRRM at 1118-1119.

15/ In Uni-coat, supra, the Board found that the struck employer, a painting subcontractor, had actively sought out and obtained an exclusive licensing agreement to use a certain brand of spray paint and persuaded a general contractor to award him a subcontract requiring the use of such paint, thereby setting the stage for potential conflict with the Union representing his employees, over the use of spray paint. The Board concluded that in these circumstances, the painting subcontractor could not "properly be characterized as 'neutral'" (185 NLRB at 932). The circumstances of the present case are clearly distinguishable from Uni-coat, for here the assignment of temporary power work was made solely by Atlas, acting in the economic interests of its clients and against the wishes and economic interests of the struck subcontractors. The district court's reliance (A. 122) on Danielson v. Painters District Council No. 20, 305 F. Supp. 1108 (S.D.N.Y., 1969), the Section 10(l) proceeding in the Uni-coat case, is misplaced. Although the district court in Uni-coat expressed reservations as to whether the question of control should be decisive in all cases, that court essentially based its denial of injunctive relief on the same analysis subsequently utilized by the Board (305 F. Supp. at 1114-1115). Moreover, as shown infra, pp. 40-54, the district court's reservations concerning the validity of the control test were based on a misreading of National Woodwork Manufacturers Association v. N.L.R.B., supra.

The struck employers in the present case (Santella and Rice) are, like the struck employer in Koch (Phillips), neutral employers entitled to the protection of Section 8(b)(4)(B), because in the circumstances summarized above, pp. 4-9 , they at all times lacked the power to resolve the Union's dispute except by giving up their subcontracts, i.e. by a cessation of business with other persons. The district court's conclusion that Koch was factually distinguishable from the present case because Phillips, the struck employer in Koch, ostensibly "did not participate in negotiating the subcontract that is alleged to violate his agreement with the Union (A. 122), is erroneous. Although in the Koch case, the contract between the owner (General Electric) and the general contractor (Koch) provided for the use of certain prefabricated piping, the Board specifically found that "/p/ursuant to its contract with Koch and the specifications made a part thereof, Phillips was required to install, inter alia, the prefabricated pipe" (201 NLRB at 59). Indeed, the Board relied precisely upon this factor in distinguishing the situation which was before the Supreme Court in National Woodwork Manufacturers Association v. N.L.R.B., supra, i.e., the Frouge case (see discussion infra, pp.43-44), from the situation involving three other contractors which involved application of the control doctrine and which was not before the Supreme Court. The Board held in Koch (201 NLRB at 61):

> It is just this /latter/ situation which is again before us now for, unlike Frouge but like the other three contractors in National Woodwork, Phillips' contract with Koch specified that Phillips was to install, as part of its contract, the pipe prefabricated beforehand by Koch at its plant. We deem this factor crucial in determining the legality of the Respondents' attempts here to enforce the admittedly valid work preservation clauses against Phillips. /emphasis in original/

Moreover, the circumstances of the present case are even more persuasive of a secondary boycott than those of Koch, for in Koch, the Union's contract with Phillips clearly prohibited Phillips from installing prefabricated piping, (201 NLRB at 60), whereas here the Union's collective bargaining argument is ambiguous with respect to the disputed work.[16/]

16/ The Union may rely upon the fact that in the present unfair labor practice case, the Board's Administrative Law Judge, subsequent to the denial of injunctive relief below, issued a decision recommending that the unfair labor practice complaint be dismissed. We submit that the Administrative Law Judge's decision was essentially premised on the same misconstruction of the control doctrine and misapplication of the Koch case as that of the court below. The Board's General Counsel and the charging party have filed with the Board exceptions to that decision, and the case is now pending before the Board. It is settled law that an Administrative Law Judge's Decision is final "only in the absence of further agency action" and that upon review of that decision by the Board, the Judge's determination of issues involving "conclusions, interpretations, law and policy," (such as are here involved) are "open to full review " and unlike credibility rulings, are not entitled to any special weight. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 494-496 (1951). "Manifestly" in these circumstances where the Board's General Counsel has filed exceptions to the Administrative Law Judge's recommended dismissal of the charges, "the complaint . . . is still pending without final disposition," and injunctive relief is still warranted. Penello v. International Longshoremen's Ass'n., et al., 455 F.2d 942 (C.A. 4, 1971); San Francisco-Oakland Newspaper Guild v. Kennedy, supra, 412 F.2d at 544, n. 1; Slater v. Denver Building and Construction Trades Council, 175 F.2d 608, 611 (C.A. 10, 1949); see also, McLeod v. National Maritime Union, supra, 457 F.2d at n. 9.

Notwithstanding that Santella and Rice were powerless to meet the Union's demands except by giving up their subcontracts, the court below concluded that the control doctrine was inconsistent with the rationale of National Woodwork Manufacturers Association v. N.L.R.B., supra, 386 U.S. 612, albeit not the express holding of that decision. [17/] Therefore the court below concluded that injunctive relief was not warranted because, in the court's view, the control doctrine "is wrong" and "unlikely to be accepted by /this Court/." (A. 122-123). We shall now demonstrate that the court's view was erroneous, because the control doctrine is essentially no more than an application of the principles laid down by the Supreme Court in N.L.R.B. v. Denver Building & Construction Trades Council, supra, 341 U.S. at 685-692 (herein Denver) and in Local 1976, United Brotherhood of Carpenters v. N.L.R.B. (Sand Door & Plywood Co.), 357 U.S. 93, 105 (1958) (herein Sand Door) governing the interpretation of the Act's secondary boycott prohibition--principles which were specifically preserved in the 1959 amendments to the Act and applied in N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe, Inc.), supra, 400 U.S. 297 (herein Burns & Roe). We shall also demonstrate that the view taken in the later decisions of several courts of appeals that the doctrine was overruled sub silentio by National Woodwork Manufacturers Association v. N.L.R.B., supra, 386 U.S. 612 (herein National Woodwork) is erroneous, being based upon a misunderstanding of the doctrine and a misreading of National Woodwork that would in effect overrule the fundamental principles of Denver and Sand Door.

17/ In National Woodwork Manufacturers Association v. N.L.R.B., the Supreme Court expressly refrained from passing upon the validity of the control doctrine (386 U.S. at 616-617, n. 3).

D. The control doctrine is an application of the principles of Denver and Sand Door which have been repeatedly reaffirmed and applied and which received Congressional approval in the 1959 amendments to the Act.

Denver, decided in 1951, remains the leading case interpreting Section 8(b)(4)(B) of the Act. When Congress in 1959 undertook to close the loopholes in the secondary boycott ban which had been disclosed by Sand Door and other cases (National Woodwork, 386 U.S. at 633-634), it made clear that it wanted Denver to "remain in full force and effect." Conf. Rep., H. Rep. No. 1147, 86th Cong., 1st Sess., p. 39 (1959), II 1959 Leg. Hist. 1433. Several efforts to reverse Denver by legislation have failed. N.L.R.B. v. Muskegon Bricklayers Union No. 5, 378 F.2d 859, 862-863 (C.A. 6, 1967). See also, H. Rep. No. 741, 86th Cong., 1st Sess., pp. 22-23, I 1959 Leg. Hist. 780-781.

In Denver, Doose & Lintner was the general contractor and all its subcontractors employed union members except one -- Gould & Preisner, the electrical subcontractor. The Building Trades Council struck the general and all union subcontractors, claiming that it was engaged in a primary dispute with Doose & Lintner because that company had not assigned the electrical work to a union subcontractor and that it sought only to "force Doose & Lintner to make the project an all-union job." 341 U.S. at 688. The Board found that the Council thereby had violated the secondary boycott ban (then Section 8(b)(4)(A) of the Act, supra, n. 12). The Court of Appeals for the District of Columbia reversed, finding that the general contractor and its subcontractor on a common project were in effect one employer because

of "the interwoven activities that the close relationship between the /prime contractor/ and the subcontractor involved." 186 F.2d 326, 337 (C.A.D.C., 1950). The Supreme Court reversed and sustained the Board, reasoning as follows (341 U.S. at 688-690):

> If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance in their contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus disposed of the dispute. However, the existence of the Gould & Preisner subcontract presented a materially different situation. The nonunion employees were employees of Gould & Preisner. The only way that respondents could attain their purposes was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Priesner's subcontract. The result is that the Council's strike, in order to attain its ultimate purpose, must have been included among its objects that of forcing Doose & Lintner to terminate that subcontract. /Emphasis added./
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> * * * *
>
> It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract. /Emphasis in original/
>
> * * * *
>
> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. /Emphasis added./

Thus, in the underlined language, Denver established four of the principles from which the control doctrine stems:

(1) a test of a neutral secondary is whether or not he has the power to "dispose of the dispute" by assigning the work to his own employees; 18/

(2) the separate status of independent contractors must be given full effect; 19/

(3) an unlawful object may be deduced from the foreseeable effect of the union's conduct; 20/ and

(4) the legality of alleged secondary conduct is not determined by the union's major or principle objective, but it is "sufficient that an objective . . . although not necessarily the only objective" be secondary.

The fifth principle underlying the control doctrine is that of Sand Door, i.e., "a violation of the secondary boycott provisions cannot be justified by a contractual arrangement between the union and the neutral employer." N.L.R.B. v. Carpenters District Council of New Orleans, 407 F.2d 804, 806-807 (C.A. 5, 1969),cited

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18/ In originally enacting the secondary boycott ban, Congress was concerned with protecting employers who "/m/ore often than not . . . are powerless to comply with demands giving rise to the /union's/ activities." H. Rep. No. 245, 80th Cong., 1st Sess, p. 23 (1947), I 1947 Leg. Hist. 314 /Emphasis added/. See Carpet etc. Layers Local Union No. 419 v. N.L.R.B. (Sears, Roebuck & Co.), 467 F.2d 392, 397, 399-400 (C.A.D.C., 1972) (herein Sears).

19/ See also, Sears, supra, 467 F.2d at 399-400, that "/t/he finding of an independent contractor relationship, while not always conclusive, is nevertheless of great importance in determining the issue of 'secondary'/ 'primary' status under Section 8(b)(4)(B) . . . ."

20/ Accord: Burns & Roe, supra, 400 U.S. at 305 (unlawful object shown by "clear implication of the demands"); Local 761, I.U.E. v. N.L.R.B. (General Electric Co.), 366 U.S. 667, 674 (1961) ("the nature of the (Cont'd)

with approval in Burns & Roe, supra, 400 U.S. at 305 (1971). Sand Door held that an employer bound by a lawful union contract to boycott another person cannot be compelled to do so by direct action of the union. The court held that such an employer has "a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor or business policy." 357 U.S. at 105 /Emphasis added./ The Court added (Ibid.):

> Such a choice, free from the prohibited pressures - whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his -- must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties. /Emphasis added./

Accord, e.g.: Ohio Valley Carpenters District Council v. N.L.R.B., 339 F.2d 142, 145 (C.A. 6, 1964) ("a legal contract does not immunize illegal action employed for its enforcement"); Local No. 5, United Association v. N.L.R.B., 321 F.2d 366, 370 (C.A.D.C., 1963), cert. denied, 375 U.S. 921 ("regardless of the legitimacy of the end sought by the union, it cannot engage in secondary pressure to obtain it"). And Sand Door makes clear that this is so even though it "may leave the union with a valid contractual provision and with no means of enforcing it other than a

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20/ (Cont'd) acts performed shows the intent"); N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 227 (1963); Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 45 (1954).

civil suit." Local No. 5, United Association v. N.L.R.B., loc. cit. Indeed, it was this very principle of Sand Door which Congress embodied in the construction industry proviso to Section 8(e) of the Act, governing jobsite clauses. Conf. Rep., H. Rep. No. 1147, 86th Cong., 1st Sess. (1959), p. 39, I 1959 Leg. Hist. 943.

The control issue was first presented to the Board in the context of a claim of "work preservation" in Deangulo and Local Union No. 98 (York Corp.), 121 NLRB 676, 685 (1958).[21/] There, the union induced employees of one Limbach, a subcontractor of York, to refuse to install heating-cooling units made by York and another company because certain sheet metal work on the units had not been done by Limbach employees. Limbach had a contract with the Union by which it agreed that "none but journeymen sheet metal workers and registered apprentices shall be employed" to do sheet metal work. 121 NLRB at 679. The Union asserted that the strike of Limbach employees was primary on the ground that it was striking to require Limbach to adhere to this contractual obligation. Finding that Limbach had given its union employees "all

21/ Some commentators have erroneously placed the origin of the doctrine in a series of Board decisions in 1962. E.g., Lesnick, Job Security and Secondary Boycotts, 113 U. Pa. L. Rev. 1000, 1036 (1965). True, one of the leading Board decisions on the doctrine did issue in 1962, I.L.A., Local 1694 (Board of Harbor Commissioners), supra, 137 NLRB 1178, but that case relied upon Deangulo and Local Union No. 98 and the decisions of two courts of appeals which had already approved the doctrine in 1960. 137 NLRB at 1182.

the work within the Union's jurisdiction which /Limbach/ had been awarded on the project," the Board reasoned:

> /Limbach/ was powerless . . . to give them additional work which it had not obtained and which, In fact, had been reserved by the very contractor /York/ through whom it had derived its own standing as an employer on the job. Id. at 685-686.

In the instant case, Santella and Rice are in the same situation as was Limbach, since Santella and Rice could not give their own employees work reserved by Atlas, the very contractor from whom Santella and Rice derived their standing as employers on the projects

The control doctrine thus employs the reasoning and principles of Denver to formulate a rebuttable presumption -- a well-established and proper tool of judicial or administrative process. After Denver, the threshhold question raised by the primary-secondary dichotomy of the Act's boycott ban is: Does the coerced employer have the power by itself to "dispose of the dispute?" Or, as the First Circuit Court has aptly put it, the determination of whether union pressure on an employer amounts to prohibited secondary boycott "can be resolved by consideration of two questions: (1) What was the union striking for? (2) Was /the struck employer/ in a position to do anything about it?" Beacon Castle Square Bldg. Corp. v. N.L.R.B., 406 F.2d 188, 190 (1969).[22/] That is the control doctrine in a nutshell. See supra, pp. 22-24 . The control doctrine is directed at answering the

22/ In Beacon Castle Square Building Corp. v. N.L.R.B., cited by the court below, (A. 121), the court of appeals, while seeming to reject the control doctrine in a footnote dictum (406 F.2d 192, n. 10), nevertheless applied the doctrine in affirming the Board's finding of no violation by the union.

second question, but always in the context of the answer to the first. The essence of the doctrine is that a contractual relation between independent contractors which withholds work from, or limits the work of, the coerced employer raises a rebuttable presumption that the coerced employer is a neutral with regard to the assignment of work which he does not control and cannot do anything about, except to force a change in the policy of another independent contractor.

Finally the principles of the control doctrine were applied, and implicitly affirmed, by the Supreme Court in N.L.R.B. v. Local 825 (Burns & Roe) (1971), supra. In that case, Burns & Roe was the general contractor of the construction project involved but employed no construction workers. Construction was handled by three subcontractors, all employing Local 825 members. The union struck all three subcontractors when one of them (White) assigned the work of tending an electric welding machine to his employees represented by another union and Burns & Roe refused to require White to reassign the work to Local 825 employees. The Third Circuit Court found that the strike did not violate Section 8(b)(4)(B) because the union's object was only to force the general contractor "to use its influence with the subcontractor to change the subcontractor's conduct, not to terminate their relationship." 410 F.2d 5, 10; 400 U.S. at 304. The Board contended (Brief to the Supreme Court, pp. 13-14) that the general contractor and the subcontractors other

than White were neutral secondaries because they "were themselves powerless to grant the Union's ultimate demand; they could only transmit the pressure which had been applied to them by coercing White in its business relations with them, as a means of bringing it around." The Supreme Court, reversing the Third Circuit and affirming the Board, found that the general and the two subcontractors, who had contracts with the union, "were not involved in the dispute" and therefore were "neutral employers" 400 U.S. at 304. Citing Denver and a Fifth Circuit decision[23/] which relied upon Sand Door, the Court held that the union was thereby "using a sort of pressure that was unmistakably and flagrantly secondary" (Ibid.) The Supreme Court necessarily, albeit implicitly, applied the control doctrine and its underlying Denver principle that the separate employer status of independent contractors must be given full effect.

E. The control doctrine was approved, prior to 1968, by soundly reasoned decisions of all courts of appeals considering it, including this Court.

The control doctrine reached the courts in 1960, and was accepted without dissent, by all courts which considered it prior to 1968. It was explicitly approved by this Court in N.L.R.B. v. Enterprise Association, supra, 285 F.2d at 645 (herein Enterprise); and applied by this Court in McLeod v. Local 282, Teamsters, supra, 345 F.2d at 145. And in the most recent court of appeals decision in point, the Fourth Circuit Court, having had the benefit of the Board's

23/ N.L.R.B. v. Carpenters District Council of New Orleans, supra, p. 30.

explication of its rationale in the Koch case (see supra, pp. 22, 23, 24), also explicitly approved the control doctrine. 490 F.2d 323 (C.A. 4, 1973). 24/

Enterprise, one of the first court of appeals decisions to approve the control doctrine, illustrates a correct application of the principles of Denver and Sand Door. In Enterprise, Consolidated Edison Company awarded Courter and Co., Inc., the general piping contract for Edison's new turbine generating plant. 285 F.2d at 643. Under this contract, Courter was to fabricate and install such piping as Edison would provide. The agreement further provided that Edison "without invalidating the contract, [could] . . . make changes by deducting from the work." (Ibid.) However, Courter had a contract with the union which in effect forbid the subcontracting of pipe fabrication. When Edison, under the power given it by the contract,

24/ The other cases which approved the doctrine are: Local 636, United Association v. N.L.R.B., 278 F.2d 858, 864 (C.A.D.C., 1960) (herein Local 636 I), and Local No. 5, United Association v. N.L.R.B., 321 F.2d 366, 369 (C.A.D.C., 1963) cert. denied, 375 U.S. 921 (herein Local No. 5); N.L.R.B. v. I.L.A. Local 1694 (Board of Harbor Commissioners), 331 F.2d 712, 716-717 (C.A. 3, 1964) affiriming, 137 NLRB 1178; Ohio Valley Carpenters District Council v. N.L.R.B., 339 F.2d 142, 145 (C.A. 6, 1964); American Boiler Mfrs. Assn. v. N.L.R.B., 366 F.2d 815, 822 (C.A. 8, 1966) (herein American Boiler I); National Woodwork Mfrs. Assn. v. N.L.R.B., 354 F.2d 594, 597-599 (C.A. 7, 1965) affirming in pertinent part, 149 NLRB 646; reversed in other respects in National Woodwork Mfrs. Assn. v. N.L.R.B., 386 U.S. 612 (1967), discussed, infra. pp. 59-60. The panel in Local 5 included the present Chief Justice Burger, and the panel in American Boiler I included the present Associate Justice Blackmun.

withdrew from Courter the fabrication of certain of the pipe systems, the union refused to install the units, claiming that it only sought to compel Courter to comply with the "fabrication" clause of its contract. 285 F.2d at 645. This Court found that the union had thereby violated the secondary boycott ban (then Section 8(b)(4)(A) of the Act, supra, n. 12), reasoning that (Ibid.):

> This argument . . . is predicated upon a faulty and incomplete view of the controlling facts. For when Courter's employees refused to handle Midwest pipe, the fabrication of the pipe was no longer a part of Courter's contract with Edison: it was an operation wholly within the control of Edison and hence not within Courter's contract with the respondent union.

This Court emphasized the locus of control over the work "at the time the unfair act was committed." 285 F.2d at 646 /Emphasis in original/. See Sand Door, quoted in Local No. 5, supra, 321 F.2d at 370, and above, p. 31, supra.

Confronted with a similar situation and a like argument of work preservation, in Local 636 I, the Court of Appeals for the District of Columbia stated (278 F.2d at 864):

> The Board was amply justified in concluding that the real targets of the controversy were Edison and Westinghouse, that they were targets of the union's dispute, and that United Engineers was, as the employer in the typical secondary boycott situation, powerless to end the dispute except by breaking off business relations with Edison. /Emphasis added./

The same conclusion was again reached by the District of Columbia Circuit in Local No. 5. There, the general contractor Venneri subcontracted the inside plumbing work to Akron and the outside pipe

work to Nickles, an excavating contractor who employed members of the Laborers' Union. To obtain plumbers, Akron made an agreement with Local 5 of the Plumbers' Union. Clause 32 of this agreement provided: (321 F.2d at 368):

> It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or general contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. * * *

The Union contended that this clause demonstrated that its real dispute was with Akron and its sole object was to change Akron's employment policies. The panel termed this "a fine example of the non sequitur." The Court added:

> Clause 32 no more demonstrates that the real target of the union's pressure was Akron than a "hot cargo" clause in the contract forbidding Akron to purchase non-union material would show that the union's dispute was with Akron, rather than its suppliers. (321 F.2d at 369).

The Court found the case to be like Local 636 I and Enterprise, supra, in that the union violated the Act's secondary boycott ban when it "brought pressure on a subcontractor who was powerless to settle the dispute." (321 F.2d at 369).

A similar contractual argument was made by the Union in the court below. The validity of such an argument requires two assumptions: (1) that the Union's complaint of contract breach by Santella and Rice is sufficient to establish that these subcontractors were the sole target of the Union's pressures and, (2) that this necessarily makes the Union's actions primary, irrespective of Santella's and Rice's

lack of control over the assignment of work. We submit that this line of reasoning could be characterized as a "fine example of a non sequitur."

The reasoning which underlies the control doctrine was further explained by the Sixth Circuit in Ohio Valley Carpenters District Council v. N.L.R.B., supra. There one Hankins contracted to do the carpenter work of an apartment project, and the builder purchased from Cardinal certain prefabricated framing for Hankins to install. Claiming that Cardinal's prefabrication of the frames violated the work preservation clause of its contract with Hankins, the Union threatened to withdraw its carpenter members from Hankins' employ if he installed them. The court affirmed the Board's finding that this threat violated the secondary boycott prohibition. Citing Denver, Local 636 I, Local 5 and Enterprise, the Sixth Circuit reasoned:

> The basic criterion is, as the statute (Section 8(b)(4)) specifically provides, the object, or objects, of the union action. So the problem is: What was the object? The Board has held . . . that, if a union demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute, it is manifest that an object of the union is to induce this cessation of business. The courts to which this problem has come have agreed with the holdings.
>
> We think this is rational and proper reasoning. So in the case before us Hankins' only means of compliance with the union demand was to cease doing business with Cardinal. Hankins had no power to do by its own act what the union demanded that it do, that is, build the framing with its own men on the jobsite. It is reasonable to hold that the object of the union was not an impossible act but was the alternative possible. /Footnotes omitted; emphasis added./ (339 F.2d at 145).

F. Subsequent decisions of other courts of appeals which reject the control doctrine, relying upon National Woodwork, misconstrue that decision and should be given no weight as precedent.

It is submitted that the decisions relied upon by the court below (A. 122) which take the view that the Supreme Court in National Woodwork overruled the control doctrine, are erroneous and should be given no weight as precedent. Koch, supra, 490 F.2d at 327. Indeed the Court in National Woodwork explicitly reserved decision on the control doctrine since certiorari had not been sought as to the portion of the Seventh Circuit's decision approving the doctrine.

1. Local 164, the first decision rejecting the control doctrine, is in conflict with Burns and Roe and Sand Door and therefore should be given no weight as precedent.

The first decision rejecting the control doctrine as a basis for identifying a neutral was N.L.R.B. v. Local Union No. 164, I.B.E.W., 388 F.2d 105 (C.A. 3, 1968) (herein Local 164). It is submitted that this decision is without weight as precedent because its holding is in conflict with Burns and Roe, supra, where the Supreme Court reversed the same court's failure to find a violation in union conduct which, in its secondary aspect, almost precisely parallels that of Local 164. In Burns and Roe, the Supreme Court termed such conduct "unmistakably and flagrantly secondary." 400 U.S. at 304. Also, as we show below, Local 164 conflicts with the principle of Sand Door.

In Local 164, as in Burns and Roe, the union struck one contractor on a project because another independent contractor on the project had assigned the work of tending an electric welding machine to his own employees, represented by another union. See discussion of Burns and Roe, supra, pp. 34-35. However, in Local 164, there was much less of a nexus between the contractors than in Burns and Roe. The struck employer in Local 164 was the general electrical contractor and the employer whose work assignment was the union's target, was a subcontractor of the general steel contractor. The two general contractors had contracts with the owner entirely separate from each other. Nevertheless, the court of appeals found that there was no unlawful object because the electrical contractor could satisfy the union by paying an electrician "for doing nothing" as long as the steel contractor used a non-electrician on the welding machine. A similar argument was made by the union and accepted by the court below. Plainly this is precisely the type of unlawful secondary conduct which Burns and Roe condemned so sharply.

Nor does the Local 164 court's reliance upon the fact that the electrical contractor had a work preservation clause in its contract with the union provide a basis for distinguishing that case from Burns and Roe. To the contrary, such reliance on the contract to excuse "unmistakably and flagrantly secondary" conduct conflicts with the Sand Door principle that a lawful contract does not immunize unlawful secondary action (supra, pp. 30-32).

For the foregoing reasons, it is submitted, Local 164 was wrongly decided, being in conflict with Burns & Roe and Sand Door, and therefore should be given no weight as precedent. 25/

2. The decisions rejecting the control doctrine in reliance upon National Woodwork misconstrue that decision as abandoning the reasoning and principles of Denver which underlie the doctrine and which were reaffirmed and applied in Burns and Roe, and therefore, should be given no weight as precedent.

While Local 164 cited National Woodwork, it did not explicitly rely upon it in rejecting the control doctrine. However, subsequent decisions, relied upon by the court below, have taken the same position, relying primarily on National Woodwork, despite the fact that the Supreme Court there specifically reserved decision on the control doctrine, 386 U.S. at 616-617, n. 3. It is submitted that these decisions also are in error and should be given no weight as

25/ The Eighth Circuit thereafter took the same position as the Third Circuit, relying primarily upon Local 164 to reverse its previous acceptance of the control doctrine in American Boiler I, supra, 336 F.2d 815. American Boiler Manufacturers Association v. N.L.R.B., 404 F.2d 556, 559 (C.A. 8, 1968) (herein American Boiler II) The Eighth Circuit also relied upon the views of former Board Member Brown, which were critical of the control doctrine, and upon the rationale of a student law review article in 77 Yale Law Journal 1401 (1968) which concluded that "The modern primary-secondary analysis requires the complete abandonment of the present 'right of control' rule" (404 F.2d at 560-561). Significantly, Member Brown was the only Board Member ever to dissent from the Board's application of the doctrine, and his views in this regard predated National Woodwork. The conclusion of the student writer in the Yale Law Journal was premised on his reasoning that "the general contractor receives his authority over job placement of the complaining unit derivatively from the subcontractor." (Ibid.) This rationale, which would stand the general contractor-subcontractor relationship on its head, disregards the teaching of Denver that the separate status of independent contractors must be given full effect (supra, pp. 29-30).

precedent because they misread National Woodwork as abandoning the reasoning and principles of Denver underlying the control doctrine, which as we have shown, supra, pp. 34-35 , were subsequently applied in Burns and Roe.

In National Woodwork, the questions before the Supreme Court were: (1) whether a primary work preservation clause of a union contract violates Section 8(e) of the Act and (2) whether a union violates Section 8(b)(4)(B) of the Act by direct action to enforce such a clause against an employer who is not required by contract with another person to purchase or install prefabricated doors. See syllabus, 386 U.S. at 613-614, and National Woodwork, 354 F.2d 594, 597 (C.A. 7, 1965). The Board had found that a primary work-preservation clause was not barred by Section 8(e) and that Section 8(b)(4)(B) was not violated by the union's enforcement of such a clause against an employer (Frouge) who "had control over the assignment of the work" and thus "was in a position to . . . settle the dispute" with the union. 149 NLRB 646, 659, n. 21. The Seventh Circuit reversed both rulings of the Board on the ground that Section 8(e) prohibits boycotts of factory-made products. 354 F.2d 594. The Supreme Court, reversing the court and agreeing with the Board, held that Section 8(e) does not prohibit a primary work preservation clause, 386 U.S. at 645-646, and sustained the Board's finding that the union's conduct against the particular employer involved, "related solely to preservation of the traditional tasks of the jobsite carpenters." /Emphasis added./

Also in National Woodwork, the Board found, and the court of appeals affirmed, that the union violated Section 8(b)(4)(B) by refusing to permit its members to hang prefabricated doors for three other contractors whose contracts with owners of the construction projects specified that the contractors would furnish and install prefabricated doors. However, as noted, certiorari was not sought as to this portion of the case and therefore, as the Supreme Court stated, the right of control doctrine was not before it. 386 U.S. 616-617, note 3.

Analysis of Local No. 742, United Brotherhood of Carpenters v. N.L.R.B., 404 F.2d 895 (C.A.D.C., 1971), cert. denied, sub nom. J. L. Simmons Co. v. Local 742, 404 U.S. 986 (herein Simmons) cited by the court below, and the District of Columbia Circuit's earlier decision in Local 636, United Association v. N.L.R.B., 430 F.2d 906 (C.A.D.C., 1970) (herein Local 636 II), reveal that they are predicated upon a misreading of National Woodwork as abandoning the reasoning and principles of Denver and Sand Door.[26/] However, as we have shown

26/ In a recent case involving application of the control doctrine, Enterprise Association (The Austin Co.), 204 NLRB No. 118, 83 LRRM 1396 (1973), Enterprise filed a petition for review of the Board's decision in the District of Columbia Circuit Court. The Court granted the Board's motion for en banc review, and the matter is pending decision by the Court.

above, pp. 28, 32, Congress in amending this section of the Act in 1959 was particularly concerned that the Sand Door principle be preserved and that Denver should "remain in full force and effect." The Supreme Court, after National Woodwork, applied those principles in Burns and Roe.

In holding the control doctrine negated, the Court of Appeals for the District of Columbia, in Local 636 II and Simmons relied upon the following language of National Woodwork (386 U.S. at 644-645) (emphasis in 430 F.2d at 909 and 444 F.2d at 900):

> The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated §8(e) and §8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. /Emphasis in panels' decisions./

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38 As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product of services, the history of labor relations between the union and the employers who would be boycotted and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 et seq. (1964).

The National Woodwork opinion concludes:

> That the "will not handle" provision was not an unfair labor practice in these cases is clear. The finding of the Trial Examiner adopted by the Board, was that the objective of the sentence was preservation of work traditionally performed by the jobsite carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the "will not handle" agreement was not a violation of §8(e).
>
> Similarly, the Union's maintenance of the provision was not a violation of §8(b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union of the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters. /Emphasis added./

In Local 636 II, the District of Columbia Circuit relied primarily upon the "touchstone" language underlined in the above quotation. But that language must be read in the light of the fact that the sole question before the Supreme Court was whether a work preservation clause is lawful and may be enforced against an employer who has the power by his own action to subcontract, or not to subcontract, the work in question. In such a situation, unquestionably the "touchstone" is whether the clause or its maintenance is addressed to "the labor relations of the contracting employer vis-a-vis his own employees." But this clearly does not answer the second question: Whether the union also has a secondary object when it is impossible for the immediate employer to comply with its demands, and only a third party can.

The importance of this second question is shown by the facts in Local 636 II. There, the union induced its members employed by Page, the plumbing subcontractor, to refuse to install air-conditioning units in an addition being built for Holy Cross Hospital. The hospital's architect had ordered that the units be "prepiped," i.e., the pipe in them cut, threaded and installed at the factory. The union based its refusal to install such "prepiped" units upon the work preservation clause in its contract with the subcontractor. This clause provided that all pipe two inches and under in diameter should be "cut, threaded and installed by employees on the job." 430 F.2d at 907. The Board found that subcontractor Page was a neutral secondary in this dispute because he did not have, and never had, the power to assign the pipe work on these units and, therefore, the union's inducement of his employees to refuse to install them violated Section 8(b)(4)(B). 177 NLRB 189, 190 (1969).

The court of appeals rejected this finding, declaring that, on the question of whether subcontractor Page was a neutral, the Board's control doctrine "is irrelevant . . . and tends to focus on the wrong factors." 430 F.2d at 909. 27/ The court reasoned (Ibid., emphasis added):

27/ In Simmons, the court conceded that the coerced employer's lack of control of the work might be considered, but only "as one of the circumstances" in assessing the union's objective, 444 F.2d at 903.

No claim has ever been made that Local 636 has any interest at all in the labor relations of Holy Cross Hospital, the usual type of "secondary" object. If the union had any objective with regard to the hospital, it was to convince the hospital not to use pre-piped units. But focusing on this aspect of the case makes for faulty analysis: the whole point of the work-preservation agreement in this case, as in National Woodwork, was to convince builders generally not to use prefabricated materials. Work-preservation clauses, of necessity, will have effect by a domino-like process: the union negotiates the restriction with its employer -- the contractor. The contractor, bound by his collective bargaining agreement, will not contract with a builder who seeks to use prefabricated materials. The builder may then accede to the demand that the work be done at the jobsite, or he may seek another contractor not bound by such a restrictive union contract.

Therefore, in one sense the ultimate "right to control" in many decisions which bear on the work-preservation clause will be in a party other than the union's immediate employer. Similarly, the work preservation agreement between the union and the immediate employer may have the effect of making that employer "cease doing business" with a builder who insists on the use of prefabricated materials. But National Woodwork teaches that these are permissible ancillary issues and effects. The determination whether a contract clause or union activity is secondary rests on an analysis which focuses on the union's objective; the question is "whether, under all the surrounding circumstances, the Union's objective was preservation of work for /the unit's/ employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." 386 U.S. at 645, 87 S. Ct. at 1268. In our view, this analysis requires the conclusion that if the union has negotiated a valid work-preservation agreement with its employer and is enforcing that agreement, the union's activity is primary. The Union is entitled to enforce its contract with the employer who signed it.

In short, we believe that the "right to control" test must be abandoned.

It is submitted that this reasoning is faulty and misconstrues National Woodwork. In the first place, neither National Woodwork nor any other case holds that the forbidden object of "effects elsewhere" or "union objectives elsewhere" must relate to another's labor relations to be unlawful. To the contrary, National Woodwork states that "/t/here need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object . . . is that employer . . . thus making the . . . boycott secondary in its aim." 386 U.S. at 644-645. Moreover, the object approved in Local 636 II of forcing the builder to "accede to the /union's/ demands . . . or . . . seek another contractor" is indistinguishable from that condemned in Burns and Roe. Thus, Burns and Roe held that an unlawful object was shown by the fact that the prime contractor /Burns/ "would be required either to force a change in /the subcontractor's/ policy or to terminate" the subcontract. 400 U.S. at 305. See Koch, supra, 201 NLRB at 63.

Equally untenable is the 636 II court's characterization of such conduct as "ancillary." While it is true that Section 8(b)(4)(B) does not prohibit "incidental effects of traditional primary activity" (National Woodwork 386 U.S. at 632), an effect can scarcely be called "incidental" or "ancillary" when it is impossible to achieve except by the forbidden means of forcing another independent contractor to change its policy or terminate a business relation. See Ohio Valley Carpenters v. N.L.R.B., quoted supra, p. 39. See Koch, supra, 201 NLRB at 63.

Consequently, to paraphrase Burns, 400 U.S. at 305, "the clear implication of /Local 636's/ demands was that /Page/ would be required either to force a change in /the hospital's or the builder's/ policy or terminate" its contract with them. As Burns and Roe added (Ibid.), "To hold that this flagrant secondary conduct with these most serious disruptive effects was not prohibited by S8(b)(4)(B) would be largely to ignore the original Congressional concern."

The Local 636 II court sought to escape this result by parsing the phrase "under all the surrounding circumstances" out of its context in National Woodwork, (the full sentence is quoted supra, p.45). The Supreme Court's reference there to "all the surrounding circumstances," we submit, related only to the initial question of whether the Union's objective truly was preservation of work for Frouge's employees. 28/ This inference is buttressed by the character of the circumstances and the Comment which the Court cites, 386 U.S. at 644-645, n. 38, quoted p.45 , supra. Taking the position that work preservation clauses should be judged under Section 8(e) by their "ultimate objects or purposes" rather than the "an object" standard of Section 8(b)(4)(B), the Comment says:

> The crucial consideration in ferreting out the true "objects" behind any given clause will be individualized factors such as the relative bargaining strength of the two parties, the existence of a dispute or possible dispute between the bargaining unit union and the subcontractors, the past course of dealings between the union and general employer, and the general economic personality of the particular industry involved. 29/

28/ See Work Preservation and the Secondary Boycott -- An Examination of the Decisional Laws since National Woodwork, 21 Syracuse L. Rev. 906, 922 (1970).

29/ And speaking of the cases in which, under the control doctrine, the Board and courts have found that conduct, purportedly to enforce (Cont'd)

Subcontracting Clauses and Section 8(e) of the National Labor Relations Act, 62 Mich. L.R. 1176, 1187, 1188 (1964). Of course, the circumstances described plainly would be relevant to the question of whether the union had a genuine objective of preserving work for the employees of the signatory employer. However, only one of the cited circumstances -- the existence of a possible dispute with the third party -- would seem to have any relevance to the question of whether the union also had an object of satisfying "union objectives elsewhere." And National Woodwork made it clear that there need not be an actual dispute" with the third party to establish an unlawful object within the meaning of Section 8(b)(4)(B).

Even more significant is the fact that, if the circumstances mentioned in the National Woodwork footnote, supra, p. 45 , were deemed determinative of "an object" for purposes of Section 8(b)(4)(B), the test would be converted into a search for the Union's principal object. This plainly would negate the "an object" language of the statute and subvert the Denver principle that an unlawful secondary boycott is established if "an objective of /the union's action/, although not

29/ (Cont'd) such clauses, violated Section 8(b)(4)(B), the same article said: ". . . when his employees struck /an employer lacking control of the work/, although their 'ultimate' object was only to obtain more work for their own unit, it was secondary activity of the kind prohibited by §8(b)(4)(B) because the strike was designed to force their employer to pressure an outside employer into reallocating his work." Id. at 1187, n. 65. See also, Comment, supra, 21 Syracuse L.R. at 922.

necessarily the only objective," is an unlawful secondary effect. supra, pp.29-30 . /Emphasis in original./ See Koch, supra, 490 F.2d at 328. The ultimate finding in National Woodwork, however, is entirely consistent with Denver. Thus, the finding of the Board which National Woodwork affirmed was that the union's conduct there "related solely to the preservation of work" for the unit employees, 386 U.S. at 646. /Emphasis added./ And the Supreme Court was explicit that the question of the validity of the control doctrine was not before it in National Woodwork 386 U.S. at 616-617, n. 3. Moreover even if the reading given National Woodwork by Local 636 II and Simmons might be deemed supportable by a broad reading of the language of the National Woodwork opinion, any such notion was dispelled by the Supreme Court's subsequent Burns & Roe decision which affirmed the Denver principle that the illegality of conduct is established where one object of the pressure is prohibited.

In sum, as held by the Fourth Circuit Court in Koch, supra, 490 F.2d at 327:

> National Woodwork did not scuttle the "right-to-control" test for, obviously, the point was not before the Court. 386 U.S. at 616-617, fn. 3. Nor does the Board presently write in disregard of National Woodwork. Rather, it reads that decision for what it is, a delineation of that degree of proof which establishes a permissible primary boycott but falls short of evidence in the interdicted secondary boycott.

Finally, the Local 636 II and Simmons decisions in essence imbue a work preservation agreement between a union and a subcontractor with all the secondary reach of the type of jobsite clause with a prime contractor which is permitted under the construction industry proviso to Section 8(e) of the Act, by holding in effect that such a clause may be applied to work assignments of the prime contractor. However, in so doing, these decisions ignore the limitation which Congress imposed on an outright proviso clause, i.e., that such a clause may not be enforced by strike or other economic action. N.L.R.B. v. Local 445, Teamsters, 473 F.2d 249, 253 (C.A. 2, 1973).

Thus, the Local 636 II and Simmons decisions permit such an agreement to shield the very type of activity which the Supreme Court in Burns & Roe termed "unmistakably and flagrantly secondary" (400 U.S. at 304), i.e., refusing to perform work for one contractor to compel another independent contractor to change a policy. Nothing in National Woodwork supports such an obliteration of the separate status of independent contractors.

In view of the foregoing, it is submitted that Local 636 II and Simmons were wrongly decided, being based upon a misconception of the control doctrine and a misreading of National Woodwork clearly in conflict with the Denver and Sand Door principles underlying the doctrine which was approved by Congress and applied in Burns & Roe. 30/

30/ Western Monolithics Concrete Products, Inc. v. N.L.R.B., 446 F.2d 522, 526-527 (C.A. 9, 1971) also rejected the control doctrine, relying upon Local 636 II and particularly the reasoning of that opinion quoted at p. 48, above, which we have demonstrated not to be supported by National Woodwork and to be in conflict with Denver, Sand Door, and Burns & Roe.

Contrariwise, the decision of this Court in Enterprise and the decisions of six other circuits approving the doctrine are soundly reasoned and in full accord with the principles of Denver, Sand Door, and Burns & Roe, which were neither undercut nor departed from in National Woodwork. Accordingly, we submit that the court below committed reversible error in failing to follow the Enterprise decision.

In light of the foregoing evidence and applicable principles of law, there was at least reasonable cause to believe that the Union's conduct was unlawful, and that, was essentially the issue before the district court.

III. THE REQUESTED INJUNCTIVE RELIEF IS JUST AND PROPER.

The Union's actions in causing a work stoppage among the employees of Santella and threatening to cause a work stoppage among the employees of Rice, were designed to defeat the objectives of the Act (supra pp. 12-14); and to disrupt the operations of Santella, Rice, Atlas, Stamford Dressed Beef, Hilti and other persons. Such deliberate conduct is the kind of activity intended by Congress to be enjoined by the court under the "just and proper" criteria established by the Act for the court's exercise of its function; and "since this injunction is sought for the protection of the public interest and in aid of a policy which Congress itself has made plain, the area for the exercise of the traditional discretion not to grant an injunction is much more limited." Brown v, Pacific Telephone and Telegraph Co., 218 F.2d 542, 544-545

(C.A. 9, 1955); see also Douds v. International Longshoremen's Association, supra, 242 F.2d at 811-812. "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined whenever a district court has been shown reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction." Wilson v. Milk Drivers & Dairy Employees Union, 491 F.2d 200, 203 (C.A. 8, 1974); Retail Clerks Union v. Food Employers Council, 351 F.2d 525, 531 (C.A. 9, 1965).

Although it is anticipated that the Stamford Dressed Beef and Hilti projects will be completed before this Court can decide the instant proceeding, injunctive relief is still warranted. As shown, the Union's primary dispute is not with Santella or Rice, but with Atlas and similarly situated general contractors, including the members of AGC, concerning the assignment of the work of maintaining temporary power on construction projects. Thus the Union made clear to Atlas that it claimed all temporary power work on Atlas' Construction projects, regardless of which employer had that work (supra, p. 6). As the Union's primary dispute has not been resolved, it may fairly be anticipated, in light of the Union's demands and its conduct with respect to the Stamford Dressed Beef and Hilti projects, that unless enjoined, the Union will resume or repeat its unlawful conduct or

similar or like acts and conduct. Therefore, as the unfair labor practice case is pending final decision by the Board, injunctive relief is "just and proper," whether the propriety of such relief is measured by general equity criteria or by the necessity for effectuating the statutory policy. For it is settled that Section 10(l) injunctive relief is warranted not only to restrain ongoing strikes, picketing or boycotts which have actually disrupted commerce, but also to restrain unfair labor practices which threaten or may tend to disrupt commerce. Solien v. Miscellaneous Drivers and Helpers Union, 440 F.2d 124, 127 (C.A. 8, 1971), cert. denied, 403 U.S. 905; Douds v. International Longshoremen's Association, supra, 242 F.2d at 812-813; Danielson v. Local 275, Laborers, 479 F.2d 1033, 1037 (C.A. 2, 1973); McLeod v. Local 25, Electrical Workers, supra, 344 F.2d at 639; Shore v. Building & Construction Trades Council, 173 F.2d 678, 682 (C.A. 3, 1949); Penello v. International Longshoremen's Association, 455 F.2d 942, 943 (C.A. 4, 1971); Retail, Wholesale & Department Store Union v. Rains, 266 F.2d 503, 506 (C.A. 5, 1959); Retail Clerks v. Food Employers Council, 351 F.2d 525, 531 (C.A. 9, 1965); Slater v. Denver Building and Construction Trades Council, 175 F.2d 608, 611 (C.A. 10, 1949); McLeod v. A.F.T.R.A., supra, 234 F. Supp. at 840.

CONCLUSION

For the foregoing reasons, we respectfully submit that in failing to find and conclude that the Board had reasonable cause to believe that the Union was violating Section 8(b)(4)(B) of

the Act and that injunctive relief was just and proper, the court below committed reversible error. Therefore the judgment of the court should be reversed and the proceeding remanded for the entry of an order granting a temporary injunction as prayed for in the petition to the court below.

Respectfully submitted,

MARVIN ROTH,
Deputy Assistant General Counsel,

ERIC MOSKOWITZ,
Attorney.

National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

GERALD BRISSMAN,
Associate General Counsel.

September, 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1927

SIDNEY DANIELSON, Regional Director of
the National Labor Relations Board,
Region 2, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION NO. 501, AFL-CIO,

Respondent-Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 13, 1974, three copies of the Brief for Petitioner-Appellant and one copy of the Appendix to the Briefs were mailed in a government-franked envelope to Ralph P. Katz, Esquire, Delson and Gordon, 230 Park Avenue, New York, New York 10017, attorney for Respondent-Appellee.

Eric Moskowitz
Attorney

Dated at Washington, D. C.
this 13th day of September, 1974.